

In its Complaint, the Complainant asserts that as a result of the Advertisement, consumers would believe SPLENDA® is sugar.

The Complainant also submits in its Complaint that the words "made from Sugar and tastes like Sugar" (these words are not correctly quoted) are used in the Advertisement and would mislead and confuse consumers into thinking the product is "as natural as Sugar". It goes on to say:

"This is misleading for consumers as they are led to believe that SPLENDA is actually sugar, when in fact it's an artificial chemical sweetener called sucralose."

In the Complainant's reply dated 20 June 2006 (the "Reply") to the response from the Advertiser dated 9 June 2006 (the "Response") the Complainant asserts:

"So, to say that SPLENDA is "made from Sugar, so it tastes like sugar" is in fact inaccurate and misleading to consumers as only a very small percentage of the product is actually sucralose."

THE ADVERTISER'S RESPONSE

The Advertiser submitted in its Response that the Complaint was fundamentally flawed with respect to both the technical facts concerning "SPLENDA* (sucralose)" and the consumer "take-out" from the Advertisement. The Advertiser submitted that the Advertisement was not misleading or deceptive or likely to mislead and deceive and that it did not contain any misrepresentation at all (and it therefore did not contain any misrepresentation likely to cause damage to the business or goodwill of a competitor). The Advertiser submitted that the complaint appeared to be that the Advertisement would mislead consumers into believing that SPLENDA® is sugar or is as natural as sugar. The Advertiser submitted that the Advertisement made it clear that SPLENDA® was not sugar as the point of the advertisement was to compare SPLENDA® and sugar as alternative products. Further, the Advertiser submitted that the Advertisement did not make any allegations or contain implications that the SPLENDA® product was a "natural as sugar" as it was identified as a low calorie sweetener in super-imposed text, and identified as being low calorie in the voice over in the Advertisement.

In its response to the Complainant's Reply (the "Further Response"), the Advertiser stated that the phrase "made from sugar, so it tastes like sugar" simply refers to the source of the sweetness in SPLENDA® rather than the product as a whole. It submitted the phrase was intended to explain to consumers why SPLENDA® is unique amongst all low calorie sweeteners as "no other low calorie sweetener is made from sugar and has a sugar-like molecular structure like sucralose". The Advertiser submitted that the non-sweetening agents were not focused upon in the Response as the non-sweetening agents have:

"nothing to do with the source of sweetness in SPLENDA®."

In its Further Response, the Advertiser confirmed that:

- *"SPLENDA® Granular comprises 98.8% Maltodextrin and 1.2% sucralose;*
- *the SPLENDA® powder included in the sachets comprise Maltodextrin, Dextrose and 1% Sucralose; and*
- *the SPLENDA® tablets comprise Maltodextrin, Lactose and 7% Sucralose."*

Finally, the Advertiser submitted in its Further Response that:

"Given that the whole theme of the advertisement is that SPLENDA® "tastes like sugar" it is only appropriate to refer in the advertisement to sugar which is the original product from which sucralose is made and which gives SPLENDA® its sugar-like taste. It would be absurd to refer to any of the non-sweetening agents which are included in SPLENDA® in the context of an advertisement that promotes the similarities in taste between SPLENDA® and sugar, as the taste of SPLENDA® is primarily derived from the sucralose component."

Maltodextrin which is the major non-sweetening agent used in SPLENDA® is a partially hydrolysed derivative of cornstarch. Maltodextrin acts as the necessary bulking agent which is used to convert sucralose into a granular form but has nothing to do with the taste of the product."

THE DETERMINATION

1. In the response from the Advertiser dated 3 July 2006 (the "Further Response") to the Complainant's Reply, the Advertiser asserted that the Reply introduced new complaints that were not previously included in the original Complaint and argued that section 2.7 of the Procedural Guidelines of the Advertising Standards Board (the "Procedural Guidelines") would prevent the Complainant from submitting new complaints in its Reply to the Advertiser's Response. Given this submission from the Advertiser, the Panel must initially determine whether the allegation articulated in the Reply (to the effect that the phrase "made from Sugar, so it tastes like Sugar" is misleading as only a very small percentage of the product is actually sucralose), should be considered by the Panel as part of the complaint we are obliged to determine. In this regard, the Panel reviewed the Response from the Advertiser to which the Complainant was entitled to provide a reply under section 2.6 of the Procedural Guidelines. In its Response, the Advertiser stated the following amongst its submissions:

"SPLENDA is derived from sugar, and thus its chemical structure closely resembles that of sugar. SPLENDA* is unique amongst all low calorie sweeteners in this respect. No other low calorie sweetener is made from sugar and has a sugar-like molecular structure like sucralose.*

We set out below the comparative chemical structures of sucrose (sugar), sucralose (SPLENDA) and competing artificial sweeteners. These graphically demonstrate that sucralose is structurally similar to sucrose, unlike other sweeteners (that are not derived from sucrose)."*

2. It is the view of the Panel that the Complainant was entitled to address these assertions in its Reply and that the submissions in reply on this issue contained in the Complainant's Reply form part of the Complaint to be determined by the Panel. Therefore, the Panel has decided that the allegation made in the Reply (to the effect that the statement that SPLENDA® is "made from sugar, so it tastes like sugar" was inaccurate and misleading to consumers for the reason that only a very small percentage of the product is actually sucralose), does form part of the Complaint and therefore will be the subject of the determination by the Panel.
3. The Panel was requested by the Advertiser to disregard certain allegations and references included in the Complaint and also in the Complainant's Reply. The Panel confirms at the outset of this determination that it disregarded, and was not influenced by, the following:
 - (a) the complaint to, and decision of, the Advertising Standards Complaints Board of New Zealand;
 - (b) references to a pending law suit in the United States of America; and
 - (c) allegations in relation to responses from a 2005 Consumer Focus Group Survey that was commissioned by the Complainant.
4. The Panel also confirms that it has confined its determination to the Advertisement and has not considered the copies of parts of the SPLENDA® packaging provided to it by the Complainant in reaching its determination.
5. The Complainant has submitted that the Advertisement contravenes sections 1.2 and 1.3 of the Code in that it is misleading and deceptive or is likely to mislead or deceive and contains a misrepresentation likely to cause damage to the business or goodwill of a competitor. In its Complaint the Complainant articulates a number of bases upon which it submits a contravention under section 1.2 of the Code has occurred but does not provide similar details in relation to the alleged contravention of section 1.3 of the Code.

6. The Panel considered the overall impression given by the Advertisement. It considered the visual content and the sound content as separate items in the context of the Advertisement as a whole. In this regard, the Panel was conscious of the decision of Mr Justice Lee in *ACCC v Target Australia Pty Ltd* [2001] FCA 1326. The Panel's determination is based upon a careful consideration of the submissions of both parties and the Advertisement as a whole. In doing so, the Panel has sought to identify the likely reaction of ordinary or reasonable purchasers of SPLENDA® or sugar (see the High Court's decision in *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85-87).
7. In its Complaint, the Complainant alleged that the Advertisement would result in consumers believing that SPLENDA® is sugar, and that therefore consumers would be misled. The Advertiser submitted that the Advertisement made it clear that SPLENDA® was not itself sugar, as the whole focus of the Advertisement was to compare SPLENDA® with sugar and to point out the differences between the products (as well as the similarities). The Panel agrees that the Advertisement is not misleading or deceptive, or likely to mislead or deceive consumers, to the extent that consumers are likely to conclude that SPLENDA® is actually sugar. The Panel is of the view that consumers would conclude that SPLENDA® is a product different from sugar as, while it is stated to be "made from sugar", it was clearly stated to also have a lower calorie content. This was made clear by both the voice-over and the superimposed text in the Advertisement.
8. The Complainant submitted in its Complaint that the Advertisement would mislead and deceive consumers by leading them to conclude that SPLENDA is "as natural as sugar". The Advertiser submitted in its Response that the Advertisement conveyed the message that the SPLENDA® product is different to sugar as it is a substitute for sugar. The Advertiser pointed out that SPLENDA® is described as being manufactured or derived from sugar and as having far fewer calories than sugar. The Advertiser concludes that consumers would understand from the Advertisement that SPLENDA® is a low calorie sweetener and not a natural product like sugar. The Panel agrees with these submissions by the Advertiser and concludes that the Advertisement does not mislead or deceive, nor is it likely to mislead or deceive, consumers by leading to the conclusion that SPLENDA® is a natural product like sugar.
9. A further way in which the Complainant has alleged that the Advertisement is misleading and deceptive is articulated in its Reply. This allegation is that as the product SPLENDA® is described as "made from sugar, so it tastes like sugar", consumers will be misled as only a very small percentage of the product is actually sucralose (the component that is manufactured from sugar).
10. The Advertisement clearly states that the product SPLENDA® is "made from sugar". There is no qualification to this statement visually or orally during the course of the Advertisement. The Complainant has alleged that this statement is misleading and deceptive or likely to mislead or deceive consumers. In this regard, the Panel has, in particular, considered the decision of Mr Justice Hill in *McPhee v Peters Foods Australia Pty Ltd* (in liquidation) (2004) 60 IPR 51. In that case, Mr Justice Hill determined that the description of a "Drumstick Gold" ice cream as being "Lemon Cheesecake" was a false description and that in the whole context of the advertisement it was misleading and deceptive. He concluded that while a sophisticated consumer of ice creams or a distributor or retailer may have concluded that the product was an ice cream product, the wording used in the context of the whole advertisement board would not necessarily lead an unsophisticated consumer to that conclusion. He stated (at page 58):

"In my view there is nothing in the context of the range board which would require 'a reasonable person in the relevant class of consumer to whom the range board was directed'. (cf Taco Co. of Australia Inc. v Taco Bell Pty Limited (1982) 42 ALR 177) to conclude that the Drumstick Gold product was, despite its description as being 'Lemon Cheesecake', merely a lemon cheesecake flavoured ice cream."

11. The Panel has also had regard to consumer perceptions likely to arise from the widely publicised legislation and regulations governing how products are described in terms of where they are made and the ingredients from which they are made – such as section 65AB of the *Trade Practices Act, 1974* (Cth) which deals with representations as to the country of origin of products. The Panel notes that goods will be regarded as "made in" a particular country if 50% of the cost of producing

the goods is attributable to production or manufacture in that country and the goods were substantially transformed in the relevant country.

12. The Panel has determined that reasonable members of the public viewing the Advertisement are likely to conclude that, at the very least, a significant proportion of the SPLENDA® product is made from some modified form of sugar. The Panel is of the view that the percentages of sucralose (the element of the SPLENDA® products which is in fact manufactured from sugar) identified in pages 2 and 3 of the Further Response namely:

- (d) 1.2% of SPLENDA® Granular;
- (e) 1% of SPLENDA® powder; and
- (f) 7% of SPLENDA® tablets

are unlikely to be considered a significant proportion of the products by reasonable members of the public viewing the Advertisement.

13. The Panel has determined that the Advertisement is likely to mislead or deceive viewers of the Advertisement as they are likely to conclude that a significant proportion of the SPLENDA® products are comprised of a modified form of sugar or of material derived from sugar when in fact modified sugar or sugar derivatives comprise a small percentage of each SPLENDA® product. The Panel has thus determined that the Advertisement contravenes clause 1.2 of the Code.
14. The Complainant alleges in the Complaint that the Advertisement contravenes section 1.3 of the Code. It does not articulate the reasons for these allegations in either the Complaint itself or in its Reply. The Panel has been provided with no grounds upon which to determine that a contravention of section 1.3 of the Code has occurred and the Panel can see nothing in the Advertisement that would reasonably lead to the conclusion that such a contravention has occurred. Accordingly, the Panel has determined that the Advertisement does not contain a misrepresentation which is likely to cause damage to the business or goodwill of a competitor and has thus determined that the Advertisement does not contravene section 1.3 of the Code.
15. Accordingly, the Panel has upheld the complaint to the extent identified above and has determined that the Advertisement the subject of the Complaint should be discontinued.